
In the United States Bankruptcy Court
for the
Southern District of Georgia
Brunswick Division

In the matter of:)	
)	
CONCRETE PRODUCTS, INC.)	Adversary Proceeding
(Chapter 11 Case <u>88-20540</u>))	Number <u>92-2100</u>
)	
<i>Debtor</i>)	
)	
)	
CONCRETE PRODUCTS, INC.)	
)	
<i>Plaintiff</i>)	
)	
)	
v.)	
)	
ROOF DECKS, INC.))	
)	
<i>Defendant</i>)	

MEMORANDUM AND ORDER
ON MOTION FOR JUDGMENT ON THE PLEADINGS

Debtor filed this adversary proceeding on December 16, 1992, seeking a declaratory judgment from the Court that Roof Decks, Inc., counterclaim in the amount of \$231,246.55, which allegedly arose from breaches of executory contracts, is a general unsecured pre-petition claim. Defendant timely answered, and on October 29, 1993, Debtor/Plaintiff filed a Motion for Judgment on the Pleadings.

In a motion for judgment on the pleadings, the non-movant is entitled to have all well pleaded factual allegations of its pleading to be considered true and all inferences must be drawn in favor of the non-moving party. A judgment on the pleadings may be granted only if it appears beyond doubt that non-movant can plead or prove no set of facts in support of his claim which would entitle him to relief. Federal Bankruptcy Rule of Procedure 7012(c) provides:

After the pleadings are closed, but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56.

Plaintiff asserts in its motion that the pleadings in this case require that judgment be entered in its favor classifying the claim of Roof Decks, Inc., as a general unsecured claim. In its response, Roof Decks, Inc., contends that the pleadings in this case do not require a judgment for the Plaintiff because several questions of fact remain concerning Concrete Products' attempted post-petition performance and the extent to which the attempted post-petition performance and promises to perform post-petition give rise to administrative expense priority claims. For reasons that follow I conclude that a judgment on the pleadings is not warranted in this case. First, I note that the pleadings have not been closed as required by Rule 7012(c). Second, Plaintiff relies on pleadings in adversary

proceeding number 90-2003, which has been transferred to the United States District Court for the Western District of North Carolina. In a motion for judgment on the pleadings the Court can only consider the pleadings of the case before it. If the court considers any matters outside the pleadings of the case before, the court must under Bankruptcy Rule 7021(c) treat the motion as a motion for summary judgment, and give the non-movant an opportunity to present other matters which would be relevant to a motion for summary judgment.

Finally, the pleadings do not foreclose the possibility that Roof Decks, Inc., might be entitled to an administrative expense for any breach of contract claims arising post-petition but pre-rejection. *See e.g., In re Subscription Television of Greater Atlanta*, 789 F.2d 1530 (11th Cir. 1986).

Consequently, Movant shall be given ten (10) days from the entry of this order to make a motion for summary judgment, and non-movant will have thirty (30) days to respond and enter any supporting evidence.

O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that Plaintiff's Motion be denied. IT IS FURTHER ORDERED that Plaintiff be given ten (10) days to file a Motion for Summary Judgment, and that Defendant have thirty (30) days from the filing of said motion to file any response and

supporting evidence.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of November, 1993.